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No. _____

IN THE
Supreme Court of the United States
October Term, 2002

PETER PAUL MITRANO,
Petitioner,

versus

THE HONORABLE WILLARD G. MARTIN, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

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48 pp

Question Presented for Review

1. After the trial court ruled that the trial court had subject matter jurisdiction, should the complaint be dismissed pursuant to Rule 12(b)(6) based on the purported absention under the Younger Doctrine or should the trial court be required to exercise discretion prior to dismissing a case under the Younger Doctrine?

Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the United States Court of Appeals for the First Circuit. Neither party is a parent, subsidiary or affiliate of any company.

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Opinion Below

The decision of the United States Court of Appeals for the First Circuit from which petitioner seeks certiorari appears in the Appendix hereto at page A-1. The Judgment Order of the trial court, the United States District Court for the District of New Hampshire also appears in the Appendix hereto at page A-4.

Jurisdiction

The decision of the United States Court of Appeals for the First Circuit was entered on August 29, 2002. This petition for writ of certiorari was filed within ninety days of said date of August 29, 2002. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

Statement of the Case

This petition for writ of certiorari arises from the filing on April 30, 2001 of a civil rights action for interfering with the right to travel filed by the petitioner, Peter Paul Mitrano (hereinafter sometimes referred to as the "father"). The action was dismissed by the trial court for failing to state a claim on the basis of Rule 12(b)(6) of the Federal Rules of Civil Procedure. The United States Court of Appeals for the First Circuit affirmed said dismissal. The father claims that he has a fundamental right to travel interstate within the United States of America. The respondent, the Honorable Willard G. Martin, Jr. (hereinafter sometimes referred to as the "judge") has unjustly interfered with the father's said fundamental right to travel interstate by holding the father in contempt of court for moving from the State of New Hampshire to the Commonwealth of Virginia. The judge failed to provide any notice whatsoever or any manner of due process to the father prior to holding the father in contempt of court.

Stated in further detail, the father filed a complaint that contained three counts and a request for declaratory and injunctive relief as a result of violations by the judge under Title 42, United States Code, Section 1983 of the father's constitutional rights to due process (both procedural due process rights and substantive due process rights) combined with a violation of the father's constitutional rights to travel interstate. On January 10, 2001, in a ruling from the bench, the judge found the father in contempt of court for moving from the State of New

Hampshire to the Commonwealth of Virginia. Thereafter, the judge found the father in contempt of court for moving to the Commonwealth of Virginia with his two sons without the judge's permission.

The complaint was filed with the trial court on April 30, 2001. Pursuant to Local Rule 4.3 of the Local Rules of the United States District Court for the District of New Hampshire, because the father was a *pro se* plaintiff before the trial court, said complaint was forwarded to the magistrate judge to determine whether the trial court had subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The highly respected Magistrate Judge James R. Muirhead issued an order that the trial court had subject matter jurisdiction on September 21, 2001. On January 22, 2002, Judge Steven J. McAuliffe dismissed the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The first count of the complaint stated that this action is the result of an extraordinary invasion of father's constitutional rights. The judge is holding the father in contempt of court for moving out of the State of New Hampshire and/or for not requesting the judge's permission prior to moving out of the State of New Hampshire. The judge has unjustly interfered with the father's fundamental right to travel interstate within the United States of America. The complaint further stated that the father moved with his two sons (then ages 8 and 13) at the end of the day of December 20, 2000 to the Commonwealth of Virginia from the State of New Hampshire and the judge ruled from the bench on

January 10, 2001 that the father was in contempt of court for moving out of the State of New Hampshire (the judge later ruled in a written order that the father was in contempt for not requesting the court's permission prior to moving); the father was not required to give notice prior to moving to the Commonwealth of Virginia, the State that issued a certain initial custody order in effect at the time that states the "minor children of the parties shall reside primarily with "Peter" [the father]; the father has a constitutional right and freedom to travel; the father and his children are not wards of the State of New Hampshire.

The lawlessness of the judge in ruling that the father is in contempt of court is clearly contrary to the established precedent and amounts to a violation of the father's constitution rights. The judge failed to provide any notice whatsoever or any manner of due process to the father prior to holding the father in contempt of court; this is another violation of the father's constitutional rights including but not limited to the right of procedural due process and equal protection under the law.

The second count of the complaint is limited to the issue of whether the judge had subject matter jurisdiction in order to determine whether or not the judge acted in clear absence of all jurisdiction. The judge issued an unlawful order on or about January 3, 2001. Said order of January 3, 2001 was issued contrary to the provisions of Title 28 of the United States Code, Section 1738A. The judge lacked subject matter jurisdiction to issue said order of January 3,

2001. The judge has acted in clear absence of all jurisdiction in the issuance of said order dated January 3, 2001 and in finding the father in contempt in a hearing on January 10, 2001 related to said order of January 3, 2001.

In third count, the father seeks a declaration and determination that the father is entitled to monetary damages.

The trial court ruled in its Order dated September 21, 2001 that: "The defense of judicial immunity, abstention doctrines and for Fed. R. Civ. P. 12(b)(6) do not go to subject matter jurisdiction. Subject matter jurisdiction has been invoked." On January 22, 2002, the trial court dismissed the action under Rule 12(b)(6). The father timely filed a notice of appeal by and through the filing of two protective notices of appeal. There have not been any cross-appeals. Thereafter, on August 29, 2002, the United States Court of Appeals for the First Circuit affirmed the trial court stating in part that:

> ". . . Finally, even if we assume that the decision to abstain is within the discretion of the trial court, we believe that a remand would be pointless since it is virtually certain from the record that, if presented with question, the district court would abstain in this case. See Dunn v. Cometa, 238 F.3d 38, 43 (1st Cir. 2001) (no point in remand where it is clear that lower court would use its discretion to abstain)."

Argument

Question: After the trial court ruled that the trial court had subject matter jurisdiction, should the complaint be dismissed pursuant to Rule 12(b)(6) based on the purported absention under the Younger Doctrine or should the trial court be required to exercise discretion prior to dismissing a case under the Younger Doctrine?

The *Younger* doctrine is not a stonewall fortress surrounding the federal courthouses and preventing entry by those whose civil rights have been emasculated. The father is not a potted plant who is required to be subject to the incompetent tribunal in the state courts in the State of New Hampshire. As this Supreme Court is aware, there are cases where the courts have found exceptions to the *Younger* doctrine.

Please note *arguendo*, that for the purpose of argument that the father will address this issue; however, the father steadfastly believes that for this Supreme Court to decide the issue in this petition, namely whether the complaint should have been dismissed under Rule 12(b)(6), it is not necessary to reach this issue at this time. In *Yuba Consol. Gold Fields* v. *Kilkeary*, 206 F.2d 884, 891-892 (9th Cir. 1953), the court stated:

> "The appellant suggests that this court is in as good a position as the trial court to determine whether equity jurisdiction should be exercised. We do not agree . . . the trial court thought that equity

> jurisdiction could not be recognized, and dismissed the complaint for failure to state a claim upon which relief can be granted. It was a ruling on a question of law and resulted in a failure to exercise discretion.
>
> "The complaint, accepting the facts properly pleaded as established, does state a claim authorizing the exercise of the trial court's discretion. Whether equity jurisdiction should be assumed . . . is a question for the trial court. The determination must rest on sound principles of law and the court may require such proof as shall be deemed necessary for the proper exercise of its discretion. We therefore must reverse . . . ."

In *Chiropractic Alliance of New Jersey* v. *Parisi*, 854 F.Supp. 299, 306-307 (N.J. 1994), the court stated that it would be improper for the court to abstain under *Younger* where discovery could support the allegations of bad faith:

> "Second, even were the prima facie elements for Younger abstention present, Plaintiff's case falls under the recognized 'bad faith and harassment' exception to Younger. *Wichert* v. *Walter*, 606 F.Supp. 1516 (D.N.J.1985). The bad faith exception applies in cases where there is 'evidence that the charges against the plaintiff were instituted with 'no genuine expectation' of their eventual success, but only to discourage the

> exercise of the plaintiff's protected rights.' Id. at 1521 (quoting *Allee* v. *Medrano*, 416 U.S. 802, 819, 94 S.Ct. 2191, 2202, 40 L.Ed.2d 566 (1974)).
>
> "This 'no genuine expectation' scenario is part and parcel of Plaintiff's case. Such conduct is alleged throughout Plaintiff's complaint and, in the context of the instant motion to dismiss, is properly presumed by the Court to be true. See *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957) (holding dismissals under Fed.R.Civ.P. 12(b)(6) warranted only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'). **As the Court cannot conclusively determine at this stage of litigation whether or not subsequent discovery in this case will bear out the allegations of bad faith, it would be improper for this Court to abstain under Younger in light of the potential evidentiary support for Plaintiff's case.** Accordingly, for the forgoing two reasons, the Court will refrain from dismissing this action under Younger." (Bold emphasis added.)

In the instant case, there is "no genuine expectation" that the trumped-up contempt charges will be successful. Said charges were

made as a pretext to deprive the father of other constitutional protected rights. The trial court denied the father's request for an opportunity to conduct discovery related to the *Younger* exceptions.

With all due respect, the New Hampshire State Court is an incompetent tribunal to decide the issues in this action. The father was born in the Commonwealth of Massachusetts in the United States of America and is and has continuously been a citizen of the United States of America. Thus, the father supposedly has rights protected under the Constitution of the United States of America. The New Hampshire State Court has repeatedly and willfully violated the father's civil rights. The judge has failed to recuse himself from the action in the New Hampshire State Court despite the repeated requests of the father. The New Hampshire State Court has shown bias and retaliatory rulings (which father contends amount to bad faith). The father contends support for bad faith is in *Cooper* v. *Casey*, 837 F.Supp. 938, 939 (Ill. 1993) wherein the court stated:

> "To support his dismissal from this action, Glasgow seeks to invoke the seminal *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) decision involving the Anti-Injunction Act, 28 U.S.C. § 2283, to bar federal court injunctions against state court prosecutions. But our Court of Appeals' most recent exposition of the Younger doctrine (*Arkebauer* v. *Kiley*, 985 F.2d 1351,

> 1357-59 (7th Cir.1993)) does not at all counsel the unavailability of injunctive relief against a prosecution that is motivated by retaliation, as Cooper and Davis have alleged here. Such an assertedly retaliatory prosecution was the subject of an extended and thoughtful discussion upholding such a claim in *Wilson* v. *Thompson*, 593 F.2d 1375 (5th Cir.1979)--indeed, *Arkebauer* itself (985 F.2d at 1358 n. 9) cited favorably a later Fifth Circuit decision (*Fitzgerald* v. *Peek*, 636 F.2d 943 (5th Cir.1981)) for the proposition that 'bad faith [Footnote omitted] is established when the prosecution was motivated by retaliation.' And *Arkebauer*, 985 F.2d at 1358-59 also quoted an earlier Seventh Circuit decision, *Collins v. County of Kendall*, 807 F.2d 95, 98 (7th Cir.1986), as having 'elaborated on the type of showing when a plaintiff asserts bad faith prosecution as a Younger exception'--and the quoted excerpt from Collins had in turn specifically quoted from Wilson's equating of retaliatory prosecution with bad faith prosecution. [Footnote omitted.]"

For example, the judge has essentially caused the children involved to become fatherless since January 2001 by ruling that father does not even have visitation rights with his children; the judge ruled in an order dated December 28, 2000 that

the father could not have any visitation rights with his daughter and then solely because the father moved out of the State of New Hampshire to the Commonwealth of Virginia in an order dated January 3, 2001 (six days later), ruled ex parte that the father could not have any visitation rights with his two sons; the judge has not allowed the father any visitation with his children for over almost two years in violation of father's constitutional rights to be allowed visitation with his children; the judge willfully violated father's civil rights by denying the father the opportunity to present witnesses at an alleged hearing in April 2001; the judge did not allow the father to complete his proffers after refusing to allow father's witnesses to testify; the judge willfully violated the father's civil rights by denying the father the opportunity to cross-examine witnesses at an alleged hearing in April 2001; the judge only scheduled one hour (over the father's objection) for a hearing on custody of three children; the judge has repeatedly refused to enforce subpoenas for witnesses to attend alleged hearings; the judge ordered father to take an involuntary mental examination by a person chosen by the guardian ad litem; the judge has willfully failed to follow 28 U.S.C., § 1738A; the judge has twice found the father in contempt of court without any basis; the judge has attempted to force the father to enter into stipulations (which contained a waiver of legal rights) against the father's will with the guardian ad litem under the threat of contempt; the judge has denied the father procedural due process; the judge has abused his powers of contempt; the judge

threatened the father with contempt of court for standing up to raise an objection at the alleged hearing in April 2001; and, the judge granted a motion to increase fees for the guardian ad litem that were filed on the same day of court over the objection of the father while denying the father's request for an opportunity to file an opposition to said motion to increase fees in violation of father's rights to reasonable notice, due process, and equal protection under the law. The *Younger* doctrine does not apply in this action.

Also see *Rivera-Puig* v. *Garcia-Rosario*, 983 F.2d 311, 320 (1st Cir. 1992) ("Third, the matters had been pending before the commonwealth courts for an inordinate length of time, for no reason apparent from the record. These factors additionally counsel against Younger abstention in this case.") Note that in the instant case, the judge issued (1) an (supposedly emergency and illegal because of 28 U.S.C., §1738A(e)) exparte order dated January 3, 2001 wherein the judge has since not allowed the father any visitation rights with his children. Meanwhile the father has been under the charge of contempt since January 10, 2001 for moving out of the State of New Hampshire to the Commonwealth of Virginia. The father contends that the time period that this matter has been (and still is) before the state courts is an inordinate amount of time to take to render a decision in child custody case. In *Rivera-Puig* v. *Garcia-Rosario*, 983 F.2d 311, 322 (1st Cir. 1992), the court also stated:

> "When the federal claim is not entangled with complicated unresolved state law questions,

> abstention is inappropriate. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). Indeed, abstention in cases where state law questions are unambiguous is impermissible because it 'would convert abstention from an exception into a general rule.' (Citations omitted) A federal court should not abstain simply to give a state court the first opportunity to vindicate federal rights. *McNeese* v. *Board of Education*, 373 U.S. 668, 672, 83 S.Ct. 1433, 1436, 10 L.Ed.2d 622 (1963)."

Another issue is the lack of subject matter jurisdiction of the state courts in the State of New Hampshire. As stated in paragraph numbered 24 of the complaint, "the issue of whether the defendant [judge] had subject matter jurisdiction" is presented for the limited purpose "to determine whether or not the defendant [judge] acted in clear absence of all jurisdiction". This issue relates to whether the contempt order of the judge was void and also to whether the judge is entitled to raise any immunity defenses. The father states that the father is not asking this Court or any federal court to rule on the matters relating to custody of children. Despite any inferences by the judge to the contrary, this action relates to violation of father's civil rights as stated in the complaint. Furthermore, contrary to the trial court's conclusion that the judge "has subject matter jurisdiction over family law issues, such as

child custody", the father contends that the federal law trumps the state law in this action. In summary, the important points of the subject matter jurisdictional issues involving the judge are that (1) the Commonwealth of Virginia issued a custody order in compliance with 28 U.S.C., § 1738A on September 4, 1992; (2) any orders from New Hampshire are void and in violation of the federal law (28 U.S.C., § 1738A) in that the New Hampshire orders were issued ex parte and/or without subject matter jurisdiction.

There is no dispute by and through the custody order of the Circuit Court of Fairfax County, Virginia, that the Commonwealth of Virginia "made a child custody or visitation determination" consistent "with the provisions of" 28 U.S.C., § 1738A. Section 20-108 of the Code of Virginia provides that the Commonwealth of Virginia shall continue to have jurisdiction over the custody order of the Circuit Court of Fairfax County, Virginia. The father currently is a resident of the Commonwealth of Virginia and has been since December 21, 2000. The children's paternal grandparents, who are contestants, have been residents of the Commonwealth of Virginia since 1972. The Commonwealth of Virginia has continuing jurisdiction pursuant to 28 U.S.C., § 1738A(c)(2)(E) and 1738A(d). 28 U.S.C., § 1738A(d) states that:

> "(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of

> this section continues to be met and such State remains the residence of the child or of any contestant."

In *Thompson* v. *Thompson*, 484 U.S. 174 (1988) this Supreme Court ruled that 28 U.S.C., § 1738A is a full faith and credit statute.

Also see *Meade* v. *Meade*, 650 F.Supp. 205, 210 (N.C. 1986), *affirmed* 812 F.2d 1473 (4th Cir. 1987), which was decided prior to *Thompson* v. *Thompson, supra,* wherein the court stated in part that:

> ". . . Thus North Carolina is under a federal duty to enforce the decree according to its terms and acted improperly in modifying Virginia's initial decree.
>
> "In further support of the conclusion that North Carolina lacks modification jurisdiction under the PKPA, the court holds that Virginia's September 3, 1985, decree modifying its initial award is consistent with Section 1738A and that order is entitled to enforcement by North Carolina as required by 28 U.S.C. § 1738A(a). Virginia, as the court granting the initial decree, has continuing jurisdiction under subsection (d) of the PKPA. See 28 U.S.C. § 1738A(c)(2)(E). The so-called continuing jurisdiction provision provides as follows:
>
> > The jurisdiction of a court of a State which has made a child custody

> determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

28 U.S.C. § 1738A(d). This provision imposes three requirements for the existence of continuing jurisdiction in Virginia: (1) a valid initial custody decree; (2) the present existence of jurisdiction under the laws of Virginia; and (3) **the current residence of one of the contestants or the child in Virginia**. Cf. *DiRuggiero* v. *Rodgers*, 743 F.2d 1009, 1016 (3d Cir.1984) . . . ." (Bold emphasis added.)

The father contends that the Commonwealth of Virginia had and has continuing jurisdiction based upon the father's residence in the Commonwealth of Virginia and/or the paternal grandparents' residence in the Commonwealth of Virginia. See the discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 342 (1998), wherein it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act "that a remaining grandparent . . . should not suffice to

confer exclusive, continuing jurisdiction". Contrary to said Uniform Child-Custody Jurisdiction and Enforcement Act, 28 U.S.C., § 1738A clearly provides that a remaining grandparent does in fact suffice to confer exclusive, continuing jurisdiction. *Also see Dyer* v. *Surratt*, 466 S.E.2d 584, 587 (Ga. 1996) ("judgment that has not been modified by a court of another State with jurisdiction to do so may hear a Georgia-resident").

Moreover, the State of New Hampshire was not a "home State" on the dates that the mother of the children filed the petitions to modify the custody order from the Commonwealth of Virginia because the children had been living in the State of Vermont part of the time with the mother prior to the filing of the petitions. In *Neger* v. *Neger*, 459 A.2d 628, 637-638 (N.J. 1983), the court stated:

> "As noted previously, the plaintiff and defendant had arranged for alternating physical custody of Carly . . . This record does not satisfy the statutory six-consecutive-month requirement. Carly had not lived with her father in California for six consecutive months 'within six months before commencement of the proceeding' involving custody in the California court . . . A contention that Carly's absence from New Jersey was temporary and therefore should not be counted as part of a six-month period assumes that residing with her father was only a visit. **However, the**

> **arrangement here was not truly characteristic of a visit, but consisted of fixed substantial periods of time in a regular alternating manner unrelated to holidays or vacations. It is possible, of course, that there may be no home state**. *See, e.g., In re the Marriage of Hubbard*, 315 N.W.2d 75 (Iowa 1982) (after Iowa divorce in 1976 in which mother was awarded custody of three children, mother and children moved so frequently before custody modification instituted in Iowa in 1979, that there was no 'home state')." (Bold emphasis added.)

Also see Johnson v. *Johnson*, 26 Va. App. 135, 149, 493 S.E.2d 668, 675 (1997), wherein this Court stated:

> "In the instant case, during the time immediately preceding both the divorce decree and the consent decree of December 1993, the child spent short periods alternatively with each parent, resulting in an equal division of her time between Virginia and New York. **At that time, the child had no single home state under the UCCJA definition** . . . ." (Bold emphasis added.)

In *St. Andrie* v. *St. Andrie*, 473 So.2d 140, 144 (La. 1985), the court also found that the child had no home state when the child lived in two different states pursuant to the agreement of the

parents, the court explained the situation and stated:

> "Analyzing the situation before the court under the 'home state' standard, during the six-month period prior to the institution of the custody proceeding . . . the child was in fact shuttled back and forth between Georgia and Louisiana every few months. Therefore, **it is clear that the child has no 'home state'**." (Bold emphasis added.)

Also see 45 Hastings L.J. 1329, 1344 (July 1994) wherein it is noted that "A child in a joint custody situation might have two established homes."

The court ruled in *State Ex Rel. Conforti* v. *Wilson*, 203 W.Va. 21, 25, 506 S.E.2d 58, 62 (1998) that "[n]aturally, **as a federal jurisdictional statute**, the PKPA preempts the UCCJA by virtue of the Supremacy Clause. (Citation omitted)" (Bold emphasis added.) *Also see Shute* v. *Shute*, 158 Vt. 242, 247, 607 A.2d 890, 893 (1992), wherein the court ruled that the PKPA preempts the UCCJA and/or the state statutes whenever there is a conflict between the same as to which state has subject matter jurisdiction concerning child custody.

Because the State of New Hampshire was not a "home State" on the dates the petitions were filed by the mother, the interpretation of the following language contained in 28 U.S.C., § 1738A(c)(2)(A) is critical:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, **or**

> (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, **and a contestant continues to live in such State**;" (Bold emphasis added.)

Note that in interpreting the language "**and a contestant continues to live in such State**", this Court must also consider the statute as a whole. Note that the language is different than the words "on the date of the commencement of the proceeding" that are in the beginning of above-quoted language of 28 U.S.C., § 1738A(c)(2)(A). Also note the difference in words contained in 28 U.S.C., § 1738A(d) that "such State remains the residence of the child or of any contestant". Thus in interpreting the language "**and a contestant continues to live in such State**", this Court should find that the plain language of said words means that the State of New Hampshire no longer had jurisdiction when all the contestants stopped living in the State of New Hampshire. In the *Matter of Guardianship of Walling*, 727 P.2d 586, 590 (Okl. 1986), the court discussed the language stated above and stated:

> "Paragraph 1.a also does not apply because the children were not in the state at the time the commencement of the proceeding. Furthermore, paragraph 1.b is not applicable **because of the requirement of having a 'person acting as parent'**

> **continued to live in the state** . . . ." (Bold emphasis added.)

Note that in discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 343 (1998), it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act that:

> "If State A had jurisdiction under this Section [UCCJEA] at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding . . . ."

In comparison, the language of 28 U.S.C., § 1738A provides that jurisdiction is lost by all parties moving out of the state prior to the conclusion of the proceedings under 28 U.S.C., § 1738A(c)(2)(A)(ii).

Accordingly, any orders issued by the State of New Hampshire after December 20, 2000 would be void for lack of subject matter jurisdiction pursuant to 28 U.S.C., § 1738A. Note also that 28 U.S.C., § 1738A(c)(2)(B) does not apply because the Commonwealth of Virginia had prior jurisdiction under 28 U.S.C., § 1738A(c)(2)(A). *See* 32 Family Law Quarterly 267, 278 (1998), where it states:

> "In contrast, the PKPA seeks to limit the exercise of **initial custody jurisdiction** to the home state, if there is one. It does this **by prioritizing home state jurisdiction over significant connection**

> **jurisdiction**. [Footnote: 28 U.S.C. § 1738A(c)(2)(A) and (B).]" (Bold emphasis added.)

In *Harris* v. *Simmons*, 676 A.2d 944, 949-950 (Md. 1996), reconsideration denied, certiorari denied 684 A.2d 454, the court stated:

> "The UCCJA must be read in conjunction with the federal Parental Kidnapping Prevention Act ('PKPA'). [Footnote omitted.] This Court has held that when a child has a home state, the PKPA 'forbids the use of significant connections as the basis for jurisdiction in child custody litigation.' (Citations omitted.)"

Also note that in the case of *In re Marriage of Leyda*, 398 N.W.2d 815, 819 (Iowa 1987), the court stated:

> ". . . The provisions of this federal legislation indicate a congressional intent that the act be applied in all interstate custody disputes. State courts considering the question have held the federal legislation preempts state law in determining when jurisdiction may be exercised in interstate custody matters. (Citations omitted.) **The federal statute uses language more specific than the UCCJA in limiting modification jurisdiction** . . . ." (Bold emphasis added.)

Another case discussing this issue is *Clarke* v. *Clarke*, 496 A.2d 361, 363 (N.H. 1985), wherein the court stated:

> "Critical to our analysis of the issue of jurisdiction presented here is the recognition that this case involves modification of an existing custody order and not formulation of an initial decree. (Citations omitted.) Under the Uniform Child Custody Jurisdiction Act (UCCJA), which New Hampshire adopted in 1979 as RSA chapter 458-A, initial jurisdiction and modification jurisdiction are governed by different standards. 'Initial jurisdiction is primarily in the home state of the child,' while '[j]urisdiction to modify an existing custody decree is reserved for the state that rendered the decree.' (Citations omitted.)"

The State of New Hampshire clearly did not have subject matter jurisdiction to modify the custody order from the Commonwealth of Virginia. In *Via* v. *Johnston*, 521 So.2d 1324, 1326 (Ala. 1987), the court stated:

> ". . . However, we have held in *Mitchell, supra,* that the PKPA does not recognize an emergency as granting modification authority; rather, it expressly states that a sister state's judgment can only be modified as is provided in § 1738A(f), *supra. Mitchell,* however, goes on to say that neither the best interest rule nor the emergency rules as to custody were abolished by the PKPA. Congress, however, established the proper forum for the determination of

> such issues in modification proceedings . . . ."

The language of 28 U.S.C., § 1738A provides clearly that under the facts the custody order from the Commonwealth of Virginia must be enforced. In *Eichelberger* v. *Eichelberger*, 345 S.E.2d 10, 12 (Va. 1986), the Court ruled:

> "Once a court has ruled on matters relating to the custody and care of minor children, and visitation rights of the noncustodial parent, the court retains jurisdiction throughout the minority status of the child involved. *Andrews* v. *Geyer*, 200 Va. 107, 104 S.E.2d 747, 751 (1958)."

It is important to note that the mother has wrongfully failed to return the two boys to the plaintiff after her scheduled visitation ended on Monday, January 8, 2001. The plaintiff has not seen any of his three children since January 5, 2001.

Arguendo, even if New Hampshire had jurisdiction under 28 U.S.C., § 1738A (which the plaintiff steadfastly denies), the ex parte New Hampshire order dated January 3, 2001 that dealt with the other children of the parties would be void because no notice whatsoever was given as required under 28 U.S.C., § 1738A. 28 U.S.C., § 1738A(e) states:

> "(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been

> previously terminated and any person who has physical custody of a child."

In addition, there was no contact made by the State of New Hampshire to the Commonwealth of Virginia prior to the entry of any of the change of custody orders that the State of New Hampshire has made to date. *See Ex Parte Raywood*, 549 So.2d 103, 104 (Ala. 1989) wherein the court stated: "we find that the Louisiana ex parte order was not made consistently with the PKPA and is not entitled to full faith and credit by the courts of Alabama"; also *see Joel M.* v. *Karen M.*, 507 N.Y.S.2d 369, 371 (1986) wherein the court stated:

> "The sole issue presented in this enforcement proceeding is whether or not the Superior Court of the State of New Hampshire in making the ex parte temporary order of custody was exercising jurisdiction substantially in conformity with the PKPA and UCCJA. Because neither the respondent-mother nor the respondent-maternal grandmother who has physical custody of the children were afforded any notice whatsoever--much less an opportunity to be heard, this Court holds and determines that the New Hampshire ex parte order dated October 2, 1986 is not entitled to full faith and credit under the PKPA or the UCCJA. (See *Sherry Ann F.* v. *Bennet S.*, 131 Misc.2d 854, 502

> N.Y.S.2d 383 (Fam.Ct., Scho.Co., 1986))."

Accordingly, it is clear that the ex parte New Hampshire order dated January 3, 2001 is not entitled to full faith and credit under 28 U.S.C., § 1738A (even if New Hampshire had jurisdiction under 28 U.S.C., § 1738A which the plaintiff steadfastly denies).

Note that in *Mebert* v. *Mebert*, 444 N.Y.S.2d 834, 837 (1981), the court emphasized that the jurisdictional requirements must be met:

> "It is true that even though the Supreme Court had both the personal jurisdiction necessary to enter a decree of divorce, it may have lacked the subject matter jurisdiction necessary to make a custody determination. (Citation omitted.)
>
> ". . . From its plain meaning of the statute (Citations omitted) this court must conclude that under the federal law the best interest of the child can not be looked at in a custody matter unless the jurisdictional prerequisites set forth in the federal statute are met, including the requirement that the child 'immediately preceding the time involved' must have lived in this state with one of its parents for at least six consecutive months. (Citation omitted.) (Bold emphasis added.)

Moreover, other courts have held that it is not contempt of court for a party to move out of a

court's jurisdiction with their children. In *Lynch* v. *Uhienhopp*, 78 N.W.2d 491, 495 (1956) the court referred to a case of a mother moving with her child out of the court's jurisdiction and the court was found to wrongfully held the mother in contempt of court because there was "no specific prohibition" preventing the mother from moving:

> "So in *Ex parte Vaughn*, 205 Ala. 296, 87 So. 792, 793, it was held that the divorced mother was not guilty of contempt for removing the child from the jurisdiction of the court and so in effect depriving the father of visitation rights granted him by the decree, there being no specific prohibition against such removal. The Alabama Supreme Court said: 'It has been held that the charge of contempt cannot be established for failure to comply with uncertain orders or judgments.'"

In *Medical Malpractice Joint Underwriting Ass'n of Rhode Island* v. *Pfeiffer*, 832 F.2d 240, 244 (1st Cir. 1987), the court stated:

> ". . . We naturally do not criticize the district court for its mistake of law in deciding to, but we are concerned that it should have taken so long for the court simply to determine to decline jurisdiction, leaving the parties where they started nine months previously. Cf. *Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77, 84, 95 S.Ct. 870, 875, 43 L.Ed.2d 32 (1975) (stating that abstention should

> not be required where a case has already been long delayed) . . . ."

As this Court is aware, the only real issue is whether the complaint states a claim upon which any relief may be granted. As petitioner previously stated:

> "The allegations in the complaint, which as this Court knows must be accepted as true when reviewing a motion to dismiss, clearly are sufficient to survive a Rule 12(b)(6) dismissal. At this time, this issue is not being decided on the merits." (Pages 6-7 of brief for appellant)

The standard of review of the Rule 12(b)(6) dismissal is *de novo*. Also note that in *Nethersole* v. *Bulger*, 287 F.3d 15, 18 (1st Cir. 2002), the court recently stated:

> "We review the Rule 12(b)(6) ruling *de novo*, accepting all factual allegations in the complaint and drawing all reasonable inferences in Nethersole's favor. See *Alternative Energy, Inc.* v. *St Paul Fire and Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The dismissal is to be affirmed 'only if, under the facts alleged, [Nethersole] cannot recover on any viable theory.' *Blackstone Realty LLC* v. *FDIC*, 244 F.3d 193, 197 (1st Cir. 2001) (citation omitted)."

Thus, this Court may decide whether or not the complaint states a claim upon which relief may be granted. For the sake of additional argument, the

judge's desire appears to be to make Section 1983 relief the legal equivalent of a dangling carrot that is impossible to reach. Said Section 1983 does not state there is an exception when a party is attempting to obtain relief from a judicial actor. Congress did not intend to make relief under Section 1983 a "catch-22" situation. It does not make sense to allow the courts to take away with one hand what Congress has provided for under Title 42 of the United States Code, Section 1983. This is not the first time in the history of the United States of America that the constitutional rights of individuals such as the father in this case have been trounced upon by the state courts. See *Mitchum* v. *Foster*, 407 U.S. 225, 240-242 (1972). As this Supreme Court of the United States so directly and pointedly stated, said Section 1983 was meant to be a means for the petitioner to seek justice. The subject contempt finding is patently bogus.

Arguendo, even if the finding of contempt could be considered a final judgment, in the case of *In re Gruntz*, 166 F.3d 1020, 1026 (9th Cir. 1999), the court stated that a judgement by a court without subject matter jurisdiction is void.

Another point is those who sleep on the streets or on the steps of buildings should not thereby be considered unequal on the scales of the law. By denying access to the federal courts, we are locking out the less fortunate and less connected. Why does the United States of America have so many homeless people? Why are there no homeless people in Singapore? Some states are unable and/or unwilling, whether by design or incompetence, to provide justice for

their citizens. The price of peace is justice for all the citizens of the United States of America. As we allow less and less justice for the less fortunate and less connected, we shall have less peace. Instead of condoning the gross injustice that the New Hampshire state courts sometime administer, the federal courts should open the doors to hear the subject violations of civil rights committed in the New Hampshire state courts.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Petitioner

Dated: November 2002.

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1. The petitioner, Peter Paul Mitrano, is a member of the Bar of this Court and other courts.